Committee on the Judiciary

Subcommittee on Courts, Intellectual Property, Artificial Intelligence, and the Internet

and

Subcommittee on the Constitution and Limited Government

Hearing: "Judicial Overreach and Constitutional Limits on the Federal Courts"

Tuesday, April 1, 2025, 10:00 am

Testimony of Kate Shaw
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Chairman Issa, Ranking Member Johnson, Chairman Roy, Ranking Member Scanlon, Chairman Jordan, Ranking Member Raskin, and Distinguished Members of the Subcommittees:

Thank you for the invitation to testify today. My name is Kate Shaw, and I am a Professor of Law at the University of Pennsylvania Carey Law School, where I teach and write about Constitutional Law, among other topics. Before joining the Penn faculty last year, I spent a dozen years teaching at Cardozo Law School, in New York City; prior to entering law teaching I served as an attorney in the White House Counsel's Office.

I understand that the purpose of today's hearing is to discuss recent judicial rulings against the Trump administration, and to evaluate some of the responses to those rulings being considered by this body—in particular, resolutions of impeachment against federal judges, and a bill that would limit the power of district courts to issue nationwide injunctions.

Let me say at the outset that what I take to be the premise of this hearing—that courts have overreached or transcended the limits of their constitutional authority in recent rulings invalidating various actions taken by the Trump administration—is badly mistaken.

It is true that the Trump administration has been on a losing streak in the federal courts. But despite the claims of some critics, these rulings do not grow out of substantive disagreements with President Trump's policy choices. The lawsuits against the executive orders and other directives issued by the President have been brought, and have overwhelmingly succeeded, because many of the President's policy initiatives have been undertaken without regard for, and often with outright contempt for, the Constitution. That includes both the constitutionally required process for lawmaking, and the rights the Constitution commands government to respect.

As every student of Constitutional Law learns, the Constitution has some provisions that are broad and open ended, and some that are specific. The Article I provisions governing the lawmaking process are relatively detailed and specific. Laws must be passed by both houses of Congress and signed by the president or repassed over a veto.[1] Laws governing funding—appropriations—are laws like any other; in other words, the Constitution gives Congress the primary authority to decide how money will be spent.[2]

The Article II provisions creating and empowering the presidency are actually far less detailed. That is particularly true about what are considered by many to be the most important provisions of Article II—specifically the "Vesting" and "Take Care" clauses, which are subject to considerable debate. But whatever the proper understanding of those provisions of Article II, it has long been settled that when the President acts, it needs to be pursuant to some authority Congress has granted, or within one of the narrow areas in which Article II gives the President the authority to act without congressional authorization. That is the heart of Justice Jackson's concurring opinion in the *Youngstown* case, still the most influential judicial account of presidential power, and one the Supreme Court reaffirmed just last year in an opinion that cited *Youngstown* ten times.[3]

What all of this means is that if President Trump wished to reshape or even eliminate many federal agencies, or to dramatically reduce government expenditures on things like foreign aid, working with his many allies in Congress, including those on this committee, was the constitutionally permissible way to do that.

If he wanted to change the laws that protect various officials from being fired at will by the president, or to remove procedural protections enjoyed by individuals in the civil service, he could have worked with Congress to make those changes.

Rather than pursue those pathways, he has ignored the laws passed by Congress and the constitutional rules that give Congress primacy in lawmaking.

Beyond those largely procedural failures, many of the administration's initiatives have flouted core constitutional principles: the freedom of speech and expression; due process; equal justice under law. President Trump has used the power of government to exact retribution against individuals and entities that have engaged in constitutionally protected activities; and he has brought the full weight of the state down on vulnerable groups the Constitution protects.

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[1] Art. I § 7 cl. 2.

[2] Art. I § 9 cl. 7, the Appropriations Clause, provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION 45-77 (2017).

[3] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). In Trump v. United States, 144 S. Ct. 2312 (2024), the Court, while announcing a broad immunity from criminal prosecution, made clear the enduring importance of *Youngstown*. *See also* Nomination of Judge John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 152 (2005) (statement of John Roberts, J.) ("there often arise issues where there's a conflict between the Legislature and the Executive over an exercise of Executive authority, asserted Executive authority. The framework for analyzing that is in *Youngstown Sheet and Tube"); id.* at 243 ("[T]he appropriate approach in this area is that it is the *Youngstown* analysis, the one set forth in Justice Jackson's concurring opinion.").

In short, this administration has been marked by a breathtaking degree of presidential unilateralism that is flatly inconsistent with statutes and the Constitution. That is true in general terms, and it is true as to specific actions. *That* is why President Trump has fared so badly in court; because so many of his actions have been clearly unlawful, and because that is clear to jurists of all stripes.

A careful examination of the administration's track record in court makes this plain. There have been approximately 151 court challenges to President Trump's actions since his second inauguration.[4] As Georgetown law professor Steve Vladeck recently noted, data available as of March 28 reveal that district courts that have issued rulings in these cases have granted some type of preliminary relief against the government in nearly 70% of cases (46 out of 67).[5]

Rulings against the government in these cases have transcended both geography and ideology. First, as to geography: 39 judges appointed by five presidents in 11 district courts have granted relief.[6] In contrast to lawsuits filed against the Biden administration, not a single one of the 67 cases was filed in a "single-judge division," and no district has been responsible for more than one sixth of the TROs or PIs (except D.D.C., the natural forum for many lawsuits against the federal government).[7]

Judges appointed by presidents of both parties have ruled against the administration. In another recent analysis, political scientist Adam Bonica examined the rulings in cases brought against the Trump administration, finding that judges Bonica terms "conservative" ruled against the administration half the time (4 of 8 as of March 19).[8] The analysis found that "centrist" judges ruled against the administration 88% of the time (7 of 8) and that "liberal" judges ruled against the administration 76% of the time (26 of 34). Professor Vladeck's analysis confirms Professors Bonica's finding that Republican appointees have ruled against the government in approximately half of the cases they've decided (9 out of 20 judges appointed by Republican presidents as of March 28). Professor Vladeck also found that although all eight cases assigned to Trump-appointed judges led to denials of relief, nine out of 12 cases before judges appointed by previous Republican presidents resulted in rulings against the government.

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[4] *Litigation Tracker: Legal Challenges to Trump Administration Actions*, Just Security (last updated Mar. 28, 2025), https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/.

[5] Preliminary relief includes either a TRO or PI. Steve Vladeck, *Setting the Record Straight on the Anti-Trump Injunctions*, One First Substack (Mar. 30, 2025), https://www.stevevladeck.com/p/136-setting-the-record-straight-on. These numbers only reflect those cases that have generated rulings either granting or denying preliminary relief in some of the approximately 151 court challenges to President Trump's actions since his second inauguration. *Litigation Tracker: Legal Challenges to Trump Administration Actions*, Just Security (last updated Mar. 28, 2025), https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/.

[6] *Id.*

[7] *Id.*

[8] Adam Bonica, *Measured Resistance: Data Reveals Cross-Ideological Judicial Opposition to Trump Administration*, On Data and Democracy Substack (Mar. 20, 2025), https://data4democracy.substack.com/p/measured-resistance-data-reveals?r=10322&utm_campaign=post&utm_medium=web&triedRedirect=true. Bonica's original Bluesky thread showed greater uniformity between conservative and non-conservative judges, but he has since revised his analysis. Bonica uses political campaign contributions to assess judicial ideology, Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS. 97, 105 (2021), while Vladeck considered only appointing president.

To be sure, some of these rulings against the government will be—and some have been—reversed on appeal. But rather than focus on the appellate process, or on remedying the many legal defects this litigation has revealed, this administration and many of its supporters have suggested that the problem is district judges. And rather than use its constitutional authority to enact laws that would give the President the power to do some of the things he wishes to do, this body has devoted itself to two things: stripping the power of federal courts to issue injunctions; and pursuing the impeachments of federal judges who have done nothing other than discharge their obligations to uphold the Constitution.

To my mind, the district court judges who have handed down decisions identifying legal defects in the administration's actions have not come close to engaging in "high crimes and misdemeanors," the constitutional standard for impeachment. And although Congress has considerable power to regulate the federal courts, potentially including restricting courts' ability to issue nationwide relief, the current moment calls for caution in pursuing change that would curtail courts' ability to meaningfully review and remedy executive action that violates the law.

In recent weeks, some criticism of courts has invoked democracy, suggesting that rulings against the administration thwart the will of the people.[9] But democracy does not begin and end with elections for president. It includes elections for membership in Congress, the branch closest to the people, and the entity whose authority these decisions protect. Democracy also means more than just elections. Of course, regular elections are a core component of democracy;[10] but so are values like the ability to engage in speech and expression, and to associate and petition. Meaningful democracy also requires genuine political equality,[11] procedural fairness, and mechanisms for the protection of minorities.[12] And in our system, courts can be a key guarantor of *those* aspects of democracy.

In the remainder of this testimony, I will first discuss the pending impeachment resolutions against federal judges in light of the prevailing understanding of the role of impeachment in the constitutional order. I will then briefly turn to proposals, including one introduced by Chairman Issa, to limit the power of federal courts to issue nationwide injunctions.

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[9] *See* @realDonaldTrump, TRUTH SOCIAL (Mar. 18, 2025, 9:05 AM), https://truthsocial.com/@realDonaldTrump/posts/114183576937425149. ("This Radical Left Lunatic of a Judge, a troublemaker and agitator who was sadly appointed by Barack Hussein Obama, was not elected President - He didn't WIN the popular VOTE (by a lot!), he didn't WIN ALL SEVEN SWING STATES, he didn't WIN 2,750 to 525 Counties, HE DIDN'T WIN ANYTHING! I WON FOR MANY REASONS, IN AN OVERWHELMING MANDATE, BUT FIGHTING ILLEGAL IMMIGRATION MAY HAVE BEEN THE NUMBER ONE REASON FOR THIS HISTORIC VICTORY. I'm just doing what the VOTERS wanted me to do. This judge, like many of the Crooked Judges' I am forced to appear before, should be IMPEACHED!!!").

[10] Melissa Murray & Katherine Shaw, *Dobbs & Democracy*, 137 HARV. L. REV. 728, 761 (2024)

[11] JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS 37 (2016).

[12] DANIELLE ALLEN, JUSTICE BY MEANS OF DEMOCRACY 68 (2023).

Impeachment

Seven pending impeachment resolutions target six district judges who have ruled against the administration. These resolutions suggest that the judicial rulings themselves, in one case together with outside activities of the judge, constitute "high crimes and misdemeanors."

The resolution against Judge Boasberg charges him with abusing the judicial power and interfering with the President's authority under the Alien Enemies Act by blocking the removal of individuals allegedly associated with a foreign terrorist organization.[13] The resolution against Judge Chuang accuses him of undermining President Trump's Article II foreign policy powers by issuing a preliminary injunction ordering the government to restore electronic access and communications for USAID employees.[14] Judge Ali is similarly accused of "marginaliz[ing]" the President's foreign policy authority, as well as his "fiduciary obligation to review federal agencies and programs," by issuing a temporary restraining order against the pausing of certain USAID funds.[15]

The resolution targeting Judge Bates stems from a TRO mandating that LGBTQI+-related content be restored to CDC, HHS, and FDA webpages.[16] Chief Judge McConnell is accused of improperly failing to recuse himself as he presided over *New York v. Trump*,[17] a case concerning federal funding to states, as he allegedly held a position as a director of a non-profit organization which receives funding from one of the plaintiff states.[18] The resolution also accuses Chief Judge McConnell of "prioritiz[ing] his own political views and beliefs over his duty of impartiality" in the case.[19] Finally, Judge Engelmayer faces two resolutions of impeachment. The first charges him with halting an Executive Order establishing the Department of Government Efficiency, "demonstrating clear bias and prejudice against the President and the 74,000,000 Americans who voted for him."[20] The second arises from an order regarding access to Treasury Department data and systems containing personally identifiable information, which the resolution alleges interfered with the President's broad authority over the executive branch.[21]

Under any existing understanding of the role of impeachment in our constitutional order, pursuing any of these would be an abuse of the impeachment power.

The Constitution provides that "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or

[13] H.R. Res. 229, 119th Cong. (2025).

[14] H.R. Res. 246, 119th Cong. (2025).

[15] H.R. Res. 174, 119th Cong. (2025).

[16] H.R. Res. 157, 119th Cong. (2025).

[17] No. 25-cv-39-JJM-PAS (D.R.I. Mar. 6, 2025)

[18] H.R. Res. 241, 119th Cong. § 2 (2025).

[19] *Id.* § 1.

[20] H.R. Res. 143, 119th Cong. (2025).

[21] H.R. Res. 145, 119th Cong. (2025).

other high Crimes and Misdemeanors."[22] The document then divides responsibility between the two chambers, giving the power of impeachment to the House, and the power to try impeachments to the Senate. The document also provides that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall ... be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Under Article III, "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour[.]"[23] Together, the good behavior clause and the impeachments clauses have been understood to make impeachment the sole method for removing federal judges.[24]

What does history tell us about accepted understandings of the phrase "Treason, Bribery, or Other High Crimes and Misdemeanors" in the context of judges?[25] While judicial impeachments have been infrequent, the history of judicial impeachments makes clear that disagreement with or disapproval of ordinary judicial rulings—which is what underlies each of the current resolutions—has not been deemed a proper object of impeachment.

Since the founding, there have been 15 judicial impeachments, with 8 convictions.[26] The first was in 1803, of Judge Thomas Pickering; the most recent, of Judge Thomas Porteous, was in 2010.[27] Some of these impeachments have been in response to manifest unfitness for the bench, as in the case of Judge Pickering, who was impeached and removed for habitual drunkenness, or Judge Kent, who was impeached for sexual assault and obstructing an investigation, and resigned before proceedings ran their course. Other impeachments have targeted corruption and bribery, like the 2010 impeachment and removal of Judge Porteous. One, of West Humphreys in 1862, was for waging war against the United States.[28]

In the only impeachment of a Supreme Court Justice, Justice Samuel Chase, the core of the impeachment case was excessive and explicit partisanship from the bench.[29] Chase, a committed and

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[22] This discussion is largely drawn from Katherine Shaw, *Impeachable Speech*, 70 EMORY L.J. 1, 7–8 (2020).

[23] Art. III § 1.

[24] There have been some scholarly suggestions that impeachment might not be the only way to remove federal judges, and that Congress might exercise its "necessary and proper" power to remove misbehaving federal judges for conduct short of "high crimes and misdemeanors." *See* Saikrishna Prakash and Steven D. Smith, *How to Remove a Federal Judge,* 116 YALE L.J. 72 (2006).

[25] *See* Katherine Shaw, *Impeachable Speech*, 70 EMORY L.J. 1, 40 (2020).

[26] Federal Judicial Center, Impeachments of Federal Judges, https://www.fjc.gov/history/judges/impeachments-federal-judges.

[27] Steve Vladeck, *The* One First *"Long Read": Why Judicial Impeachments Have Been Rare*, ONE FIRST (Mar. 3, 2025), https://www.stevevladeck.com/p/128-impeaching-federal-judges.

[28] Federal Judicial Center, Impeachments of Federal Judges, https://www.fjc.gov/history/judges/impeachments-federal-judges.

[29] GENE HEALEY, CATO INST., INDISPENSABLE REMEDY: THE BROAD SCOPE OF THE CONSTITUTION'S IMPEACHMENT POWER 20 (2019); *https://www.cato.org/sites/cato.org/files/pubs/pdf/gene-healy-indispensable-remedy-white-paper.*pdf (describing the "triggering offense" of the Chase impeachment as a "partisan diatribe Chase had unleashed on a Baltimore grand jury"*);*

partisan Federalist, had been nominated by President George Washington in 1796, and after the change in party control following the election of 1800, became an outspoken critic of the Jefferson administration and Jefferson's Republican party.[30] In 1804, the House approved eight Articles of Impeachment against Chase, all related to his conduct during several trials and grand jury proceedings.[31] One involved Chase barring defense counsel in a treason trial from addressing the jury; two dealt with highly partisan jury charges; another centered on a grand jury charge in which Chase registered his opposition to the repeal of the Judiciary Act of 1801 and "suggested that the authors . . . should be replaced at the next election."[32] In short, Chase's partisan speech and conduct were worlds away from the rulings at issue in the cases that have drawn the current impeachment resolutions. Moreover, Chase was ultimately acquitted after several members of the Senate broke party ranks; today, the impeachment and acquittal are viewed as helping to develop a norm both of judicial nonpartisanship and of the impropriety of purely partisan impeachments.[33]

The clear difference between historical impeachment efforts and current calls for judicial impeachment by President Trump and others is likely what led Chief Justice Roberts to issue a rare statement last month responding to such calls. The Chief Justice's statement was brief but pointed: "For more than two centuries, it has been established that impeachment is not an appropriate response to disagreement concerning a judicial decision. The normal appellate review process exists for that purpose."[34]

Late last week, the Chief Judge of the Eleventh Circuit, Judge William Pryor, endorsed Chief Justice Roberts's statement, noting that: "All the chief justice did, I thought modestly and appropriately, was to point out the unbroken tradition in American history that we don't impeach judges for decisions that are unpopular or that we may think are wrong or right, whatever it may be, wrong, controversial."[35]

WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 115 (1992).

[30] Katherine Shaw, *Partisanship Creep*, 118 NW. U. L. REV. 1563, 1586 (2024).

[31] 3 Asher C. Hinds, Hinds/ Precedents of the House of Representatives of the United States §§ 2344–47 (1907).

[32] KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 22 (1999); Charles D. Harris, *The Impeachment Trial of Samuel Chase*, 57 A.B.A. J. 53, 54–56 (1971).

[33] FRANK O. BOWMAN, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT IN THE AGE OF TRUMP (135) ("Chase's acquittal is generally agreed to stand for the proposition that impeachment should not be employed as a purely partisan weapon, particularly against the judiciary."); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 41 (1999).

[34] Amy Howe, *Chief Justice Rebukes Trump's Call for Judicial Impeachment*, SCOTUSblog (Mar. 18, 2025, 3:01 PM), https://www.scotusblog.com/2025/03/chief-justice-rebukes-trumps-call-for-judicial-impeachment/.

[35] Amarica's Constitution, *Wisdom from Breyer to Pryor - Special Guest Judge William Pryor*, Apple Podcasts, at 1:01 (Mar. 27, 2025), https://podcasts.apple.com/us/podcast/wisdom-from-breyer-to-pryor-special-guest-judge-william/id1549624070?i=1000701148744.

Until now, that practice has been largely beyond dispute. Indeed, during the Biden administration, despite numerous lower-court injunctions of administration policies,[36] not a single impeachment resolution was introduced against a district court judge. The introduction of the current impeachment resolutions has already been a profound escalation—one that threatens the ability of courts to impartially administer justice and discharge their constitutional duties. The resolutions should go no further.

Reforming the Nationwide Injunction

Recent years have seen pitched debates about the desirability and permissibility of nationwide or universal injunctions—that is, injunctions that order relief that reaches beyond the parties to the litigation.[37]

There has been an undeniable recent increase in the number of nationwide injunctions. A compilation last year in the *Harvard Law Review* found that of 127 nationwide injunctions issued between 1963 and 2023, 96 were issued between 2001 and 2023, with just over half (64) issuing against the Trump administration.[38] These numbers are striking, and they are likely the result of a number of background conditions: less congressional activity resulting in more unilateral executive action; the decline of the class action device; the ascent of states as plaintiffs in challenges to federal policy.

As discussed above, in the first two months of the new administration, judges in 46 cases brought against the federal government have granted some sort of preliminary relief, although not all have been nationwide injunctions.[39]

There are many potential explanations, all more plausible than bias or antipathy for Trump administration initiatives, for these numbers. To begin, the second Trump administration has issued more executive orders in its first two months than any administration in history.[40] As I've already noted, many of those orders were procedurally or substantively at odds with existing statutes or constitutional rules. In addition, many directives appear to have circumvented traditional Department of Justice processes for drafting executive orders and other presidential directives.

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[36] This was true despite highly questionable rulings by district judges in this period, including by Texas District Judge Matthew Kacsmaryk, whose decision to allow antiabortion doctors and organizations to challenge the FDA's approval of mifepristone was later unanimously reversed by the Supreme Court. All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507, 560 (N.D. Tex. 2023), *aff'd in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *rev'd*, 602 U.S. 367 (2024).

[37] Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 943 (2020); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017).

[38] *Chapter Four District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1705 (2024).

[39] Steven Vladeck, 136. *Setting the Record Straight on the Anti-Trump Injunctions*, One First Street, https://www.stevevladeck.com/p/136-setting-the-record-straight-on.

[40] Jack Goldsmith, *Problems with Universal Injunctions Against Trump's Program*?, EXECUTIVE FUNCTIONS (March 21, 2025), https://executivefunctions.substack.com/p/problems-with-universal-injunctions.

All of this suggests that in many or most recent instances, courts have merely responded to an environment in which internal executive-branch legal checks are being circumvented or are not operating, leaving the judiciary to step into the breach.

In this environment, limiting or eliminating the ability of courts to issue nationwide relief would remove the only currently operating mechanism for responding to violations of statutes and core constitutional protections. Beyond that concern, relegating plaintiffs to individual litigation to assert the rights that have been threatened by many of this administration's moves would be both deeply inefficient and out of reach for many individuals.

That is not to say that there is no need for reform of any aspect of the universal injunction. Single-judge divisions, for example, which allow plaintiffs to hand-pick judges, are clearly in need of reform.[41] Some judges have abandoned adherence to traditional equitable tests in favor of rulings that focus exclusively on the merits[42]—and merits determinations often made under extreme time pressure and without full ventilation of either facts or law. The bill that is currently pending, however, does not appear to address those concerns.[43]

Thank you again for the opportunity to testify today. I look forward to your questions.

[41] Stephen I. Vladeck, *Don't Let Republican 'Judge Shoppers' Thwart the Will of Voters,* N.Y. TIMES (Feb. 5, 2023), https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html.

[42] Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. (forthcoming 2025).

[43] No Rogue Rulings Act, H.R. 1526, 119th Cong. (2025).